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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. NATHAN DALE CRONEN, Petitioner.	2 CA-CR 2007-0385-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20012680

Honorable Virginia C. Kelly, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines
Tucson
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Nathan Dale Cronen
Florence
In Propria Persona

E S P I N O S A, Judge.

¶1 Petitioner Nathan Dale Cronen was convicted in 2001 of two counts of attempted sexual conduct with a minor pursuant to a plea agreement. In this petition for review, he challenges the trial court's September 24, 2007 order dismissing his third notice of post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. Absent a clear abuse of discretion, we will not disturb that ruling. *See State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). An abuse of discretion includes an "erroneous ruling on a question of law, such as whether a post-conviction claim is or is not precluded." *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). The court did not abuse its discretion here.

¶2 In his first post-conviction proceeding, Cronen asserted the trial court had violated his due process rights at sentencing. The court denied relief, and we denied relief on review. *State v. Cronen*, No. 2 CA-CR 2003-0164 (decision order filed June 18, 2004). In his second Rule 32 proceeding, Cronen sought relief based on *Blakely v. Washington*, 542 U.S. 296 (2004). The trial court concluded that, although *Blakely* applied, no relief was warranted because the ten-year prison term the trial court had imposed was the presumptive term for the offense. On review, we agreed, denying relief. *State v. Cronen*, No. 2 CA-CR 2005-0124-PR (decision order filed Dec. 20, 2005).

¶3 Cronen filed his third notice of post-conviction relief in September 2007. In that notice, he asserted he is entitled to sentencing relief pursuant to Rule 32.1(c) because the ten-year term on amended count seven of the indictment was erroneously enhanced pursuant to A.R.S. § 13-604.01, relying on this court's decision in *State v. Gonzalez*, 216

Ariz. 11, 162 P.3d 650 (App. 2007). Cronen maintains the sentence is illegal and constitutes fundamental and jurisdictional error that can be raised at any time. In a well-reasoned minute entry, the trial court found the claim precluded under Rule 32.2. Cronen subsequently filed a motion to supplement his notice and requested the court reconsider its dismissal of the notice pursuant to Rule 32.9(a). He again argued the sentence was illegal based on *Gonzalez*, that the error was jurisdictional, and that it could be raised at any time. He also argued that to the extent the claim could be precluded, previous counsel had been ineffective for failing to raise it in the first or second post-conviction proceedings. The court denied both motions, finding, (1) nothing in Rule 32.5 suggests a notice of post-conviction relief can be corrected after it has been dismissed, and (2) "Fundamental error means that an issue is not precluded by waiver for failure to object at trial and thus may be brought in a Rule 32 of-right proceeding." The court added: "Fundamental error does not create an exception to preclusion under Rule 32.2[,] and this Court declines to expand the list of non-precluded grounds for an untimely Notice."

¶4 In his petition for review, Cronen contends, as he did below, that his notice raised a nonprecluded claim because he alleged fundamental and jurisdictional error, even though his claim admittedly falls under Rule 32.1(c) and not a ground excepted from preclusion under Rule 32.2(b). Relying on this court's decision in *State v. Vargas-Burgos*, 162 Ariz. 325, 783 P.2d 264 (App. 1989), he argues that the imposition of an illegal sentence is a matter of jurisdiction, which can be raised at any time. And, he points out this

court found the sentencing error in *Gonzalez* fundamental and granted relief on review from a post-conviction proceeding after an appeal in which Gonzalez had not raised this sentencing error. Cronen again asserts that, even if the claim can be precluded, counsel was ineffective for failing to assert the claim in the initial Rule 32 petition or, at the very least, in the second proceeding.

¶5 The trial court did not err in dismissing Cronen's third notice of post-conviction relief. Like statutes, we interpret rules according to their plain meaning. *See State v. Hansen*, 215 Ariz. 287, ¶ 7, 160 P.3d 166, 168 (2007). Rule 32 specifically contemplates that challenges to the legality of a sentence may be waived and precluded. Rule 32.2(a) provides, inter alia, that a defendant shall be precluded from obtaining post-conviction relief based on a ground that "has been waived at trial, on appeal, or in any previous collateral proceeding." Only claims that fall within Rule 32.1(d), (e), (f), (g), or (h) are excepted from the preclusive effect of Rule 32.2(a). *See* Ariz. R. Crim. P. 32.2(b). Cronen concedes his claim falls under Rule 32.1(c), and he has not asserted it would be cognizable under any other subsection.[1] Thus, even assuming the claim is meritorious, it is precluded nevertheless.

¶6 This conclusion is consistent with our decision in *Swoopes*. There we held: "Not all error that is fundamental involves the violation of a constitutional right that can be

[1]Rule 32.1(c) provides the following as a ground for post-conviction relief: "The sentence imposed exceeded the maximum authorized by law, or is otherwise not in accordance with the sentence authorized by law."

waived only if the defendant personally does so knowingly, voluntarily, and intelligently." *Swoopes*, 216 Ariz. 390, ¶ 41, 166 P.3d at 958. We added:

> Although it is true that by failing to raise an issue in the trial court, a defendant "forfeit[s] the right to obtain appellate relief unless [the defendant can] prove that fundamental error occurred," *State v. Martinez*, 210 Ariz. 578, n. 2, 115 P.3d 618, 620 n. 2 (2005), different principles come into play when Rule 32.2 is implicated. *See, e.g.*, [*State v.*] *Espinosa*, 200 Ariz. 503, ¶¶ 8, 10, 29 P.3d [278,] 280, 280-81 [(App. 2001)]. Were we to find otherwise, an exception to the rule of preclusion for fundamental error that does not implicate a personal, constitutional right would swallow the rule. Moreover, if our supreme court had intended that fundamental error be an exception to preclusion under Rule 32.2, the court presumably would have expressly said so in the rule itself or the comment thereto.

Id. ¶ 42.

¶7 Neither *Vargas-Burgos* nor *Gonzalez* addressed whether a defendant can be precluded by Rule 32.2 from challenging a sentence on the grounds of illegality and fundamental error in a successive petition for post-conviction relief. In *Vargas-Burgos*, we simply refused to find waived, for purposes of the defendant's direct appeal, a claim of sentencing error that we characterized as fundamental on the ground that the defendant had failed to object in the trial court. *See* 162 Ariz. at 327, 783 P.2d at 266. Rule 32.2 simply was not implicated in that case. And contrary to Cronen's suggestion, *Gonzalez* involved an "of-right" proceeding, *see* Rule 32.1, even though Gonzalez had appealed his convictions after a jury trial. *See* 216 Ariz. 11, ¶ 1, 162 P.3d at 651. The petition for review arose out of a probation revocation proceeding. Gonzalez admitted he had violated probation, *see id.*;

therefore, his only means of obtaining review after the court revoked probation and sentenced him to prison was through Rule 32. Moreover, both *Vargas-Burgos* and *Gonzalez* were decided before we decided *Swoopes*.

¶8 Finally, Cronen has not persuaded us the trial court abused its discretion by denying his request to "correct" the already dismissed notice of post-conviction relief to add a claim of ineffective assistance of counsel. And in any event, even had the court permitted Cronen to add such a claim, bootstrapping the underlying, precluded claim to a claim of ineffective assistance of counsel would have been unavailing. Based on our decision in *Swoopes*, the claim is similarly precluded. *See* 216 Ariz. 390, ¶ 23, 166 P.3d at 952.

¶9 We grant Cronen's petition for review. But for the reasons stated herein, we deny relief.

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PHILIP G. ESPINOSA, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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GARYE L. VÁSQUEZ, Judge